No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

STATE OF TEXAS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR INTERVENORS-RESPONDENTS JANE DOES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

On November 20, 2014, the Secretary of Homeland Security, consistent with the congressional mandate to prioritize removal of serious criminals, issued a guidance memorandum (Guidance) setting specific criteria for his subordinates to use in considering case-by-case grants of deferred action for a certain population of undocumented immigrants who are low priorities for removal—long-term residents without criminal records who are parents of U.S. citizen or lawful permanent resident (LPR) children. Deferred action itself is only a temporary forbearance from removal, not an immigration status. It conveys no rights or benefits on its recipients, and it can be revoked at any time.

The questions presented are:

1. Whether a State that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, to challenge the Guidance because it will lead to more aliens having deferred action.

2. Whether the Guidance is arbitrary and capricious or otherwise not in accordance with law.

3. Whether the Guidance was subject to the APA's notice-and-comment procedures.

4. Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, Sec. 3.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners and Respondents are as described in the Petition. Pet. II. Intervenors-Respondents are three individuals who proceed under the pseudonyms Jane Doe #1, Jane Doe #2, and Jane Doe #3 in this litigation. They are undocumented immigrant mothers of U.S. citizen children and longtime residents of Texas, and they would be eligible to apply for deferred action under the Guidance if it is implemented. Intervenors-Respondents were parties in the court of appeals at the time of the filing of the petition. They proceed in this Court as Respondents supporting Petitioners under Rule 12.6.

Intervenors-Respondents moved to intervene in the district court in January 2015, prior to that court's preliminary injunction hearing. After their motion was denied, they participated as *amici curiae* in the district court and court of appeals while also appealing the denial of intervention. J.A. 3; J.A. 7-9. On November 9, 2015, the same three-judge panel of the court of appeals that affirmed the injunction by divided vote unanimously re· rsed the denial of intervention, holding that Intervenors-Respondents were entitled to intervene of right. *Texas v. United States*, 805 F.3d 653 (2015). The court of appeals then granted party status in the injunction appeal to Intervenors-Respondents prior to the filing of the Petition. J.A. 5.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29.6 STATEMENT ii

INTRODUCTION 1

STATEMENT OF THE CASE 4

A. The Guidance Is Designed To Apply To A Low-Risk, Long-Term Population Of Parents To U.S. Citizen Children 4

B. The Secretary Has Long-Standing Authority To Make Relief From Removal Available To Undocumented Immigrants, Including On A Class-Wide Basis 6

C. The Secretary Issues The Guidance To Bring The Removal System In Line With Congressional Priorities And Promote Uniform Enforcement 14

1. Challenges Posed By Limited Congressional Appropriations 14

2. The Failure Of Secure Communities And The Success Of DACA 15

3. The Secretary Issues The DAPA Guidance 19

TABLE OF CONTENTS
(continued)

Page

D. Eligibility For Work Authorization And Other Benefits Arises By Operation Of Existing Law, Not From The Guidance 21

SUMMARY OF THE ARGUMENT 22

ARGUMENT 27

I. RESPONDENTS HAVE NO STANDING TO CHALLENGE THE GUIDANCE 28

A. The Alleged Costs Of Issuing Driver's Licenses Are Insufficient For Standing 29

B. Allowing Respondents Standing Would Paralyze Immigration Enforcement And Administrative Decisionmaking 35

II. THE GUIDANCE IS NOT REVIEWABLE UNDER THE APA 39

III. RESPONDENTS' APA CLAIMS FAIL ON THE MERITS 44

A. The Guidance Is A General Statement Of Policy Exempt From Notice-And-Comment Requirements 44

B. The Secretary Had Authority To Issue The Guidance And To Grant Work Authorization To All Recipients Of Deferred Action 49

TABLE OF CONTENTS
(continued)

Page

IV. THE TAKE CARE CLAUSE DOES NOT GIVE RESPONDENTS A CLAIM, AND IN ANY CASE THE GUIDANCE IS A FAITHFUL ATTEMPT TO EXECUTE THE LAW 55

CONCLUSION 60

TABLE OF AUTHORITIES

Page(s)

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208 F.3d 1015 (D.C. Cir. 2000) 47

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132 S. Ct. 2492 (2012) ..... passim

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369 U.S. 186 (1962) 56, 57

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467 U.S. 837 (1984) 51

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441 U.S. 281 (1979) 44, 45, 46

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TABLE OF AUTHORITIES
(continued)

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206 U.S. 230 (1907) 35

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543 U.S. 335 (2005) 7, 40

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410 U.S. 614 (1973) 28

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504 U.S. 555 (1992) 28, 29, 56

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549 U.S. 497 (2007) 23, 34, 35

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415 U.S. 199 (1974) 44

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521 U.S. 898 (1997) 55

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338 U.S. 537 (1950) 6

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454 U.S. 464 (1982) 29

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(continued)

Page(s)

CONSTITUTIONAL PROVISIONS AND STATUTES

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5 U.S.C. § 553(b)(A) 44
5 U.S.C. § 701(a)(2) 39
5 U.S.C. § 706 57
5 U.S.C. § 5702 38
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6 U.S.C. § 202(5) 7
8 U.S.C. § 1101 50
8 U.S.C. § 1101(a)(15)(T)(i) 10
8 U.S.C. § 1101(a)(15)(U)(i) 10
8 U.S.C. § 1103 52
8 U.S.C. § 1103(a)(1) 6
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8 U.S.C. § 1182(a)(9)(B) 22
8 U.S.C. § 1182(a)(9)(B)(i) 22, 53
8 U.S.C. § 1182(a)(9)(B)(ii) 22
8 U.S.C. § 1182(a)(9)(C)(i)(I) 53
8 U.S.C. § 1229b 51
8 U.S.C. § 1252(g) 40

TABLE OF AUTHORITIES
(continued)

Page(s)

8 U.S.C. § 1324a(a) 43, 52

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8 U.S.C. § 1611(a) 22

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INTRODUCTION

Respondent States attempt to use the federal courts as a political weapon to interfere with the Executive's control of the removal system. *Arizona v. United States*, 132 S. Ct. 2492, 2499, 2506 (2012). But the Guidance they challenge in this case is just that—non-binding guidance. Pet. App. 417a-419a. The Secretary of Homeland Security has decided to instruct Department of Homeland Security (DHS) employees to use prosecutorial discretion on a case-by-case basis to defer removals of immigrants who meet certain specified criteria. The Guidance memorializes that decision and conveys those instructions. It does nothing more.

The Secretary issued the Guidance to address a pressing immigration concern. There are an estimated 11 million undocumented immigrants in the United States, but DHS only has funding to remove approximately 400,000 individuals each year. J.A. 40, 55. Congress, recognizing this fact, has directed DHS to focus enforcement on identifying and removing serious criminals. Pet. App. 451a. DHS previously attempted to do this by creating a prioritization system that classified certain criminals and violators as high priorities for removal. But experience demonstrates that articulating prioritization criteria without more is insufficient to focus resources as Congress has directed.

The Guidance is an attempt to address this problem by identifying, registering, and temporarily deferring removal for many of the lowest-priority cases, thereby allowing enforcement resources to be devoted to removing criminals, potential terrorists, and

recent border-crossers. It channels case-by-case grants of discretionary relief toward immigrants like Intervenors-Respondents Jane Does, long-time U.S. residents without criminal records who work hard in low-paying jobs to provide for their families, care for their U.S. citizen children, and volunteer in their communities and churches. J.A. 498-507. The Guidance seeks to ensure that thousands of DHS employees who apply prosecutorial discretion will have uniform, transparent instructions for treating like low-priority cases alike. It also encourages eligible immigrants to self-identify so that agency resources need not be spent finding and keeping track of them. DHS (and Immigration and Naturalization Service (INS) before it) has employed similar initiatives for decades—including one begun during the Reagan Administration that applied to roughly the same percentage of the undocumented population.

Respondents do not challenge the Guidance's role as a mechanism for implementing the prioritization criteria. Instead, they attempt to turn the Guidance into something it is not: a direct conferral of status and benefits. Were the Jane Does to apply for deferred action, they would have to register, submit to background checks, supply biometrics, and pay fees—all with no guarantee of receiving deferred action. Pet. App. 417a-418a. The DHS employee reviewing the applications would have to determine, on a case-by-case basis, whether the particular Jane Doe is a priority for removal, meets the other specified DAPA criteria, and "present[s] no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate." Pet. App. 417a.

Even if the Jane Does were to receive deferred ac-

tion, it would neither confer work authorization nor give them a pathway to immigration status or a defense to removal. It would simply move them to the back of the line for enforcement action for a limited period. The Does' presence would become "lawful" only to the extent that DHS knows they are present in the United States and has chosen, for the moment, not to remove them—a tenuous condition that DHS could revoke at any time. Receiving deferred action would also make the Does eligible to separately apply for work authorization. Any safety net programs for U.S. workers entail separate applications and the operation of other laws not challenged here. The Guidance itself would grant the Does nothing.

Indeed, the only radical aspect of this case is Respondents' claim that they should be able to prevent DHS from implementing the Guidance, not through petitioning Congress, but by bringing suit in federal court. States may not use the courts to interfere with the Executive's exercise of its enforcement authority, particularly not where, as here, the Secretary is following Congress's intent by targeting resources at high-priority cases. As this Court's decision in *Arizona*, 132 S. Ct. at 2498-99, made clear, although immigration is important to States, the control of immigration enforcement lies entirely with the federal government.

As an initial matter, Respondents' suit must be dismissed for lack of standing. Although they claim the Guidance will incidentally cause harm to their State budgets, the alleged costs are far too conjectural and remote to give them standing to enjoin the Executive's immigration enforcement decisions. In the alternative, their claims should be dismissed be-

cause they seek judicial review of a decision concerning the exercise of enforcement discretion, in contravention of *Heckler v. Chaney*, 470 U.S. 821 (1985). Respondents' APA claims fail because the Guidance is a non-binding statement of policy that is perfectly compatible with existing law. And their unprecedented attempt to wield the Take Care Clause as a sword fails, for that provision does not allow a cause of action. Moreover, whether the Executive has "faithfully" exercised prosecutorial discretion is a non-justiciable political question, and in any case the Guidance *is* a faithful attempt to execute the law by ensuring that discretion is exercised in a uniform, non-arbitrary manner. This Court should reaffirm the Executive's authority over the removal system, which for more than a year has been disrupted by the district court's preliminary injunction, and reverse the judgment of the court of appeals.

STATEMENT OF THE CASE

A. The Guidance Is Designed To Apply To A Low-Risk, Long-Term Population Of Parents To U.S. Citizen Children

The Executive is charged with implementing enforcement with respect to a large and increasingly varied immigrant population. The Guidance is applicable only to a specific segment of that population that poses a very low risk of committing crimes or threatening national security: long-term residents with no criminal history who are parents of U.S. citizens or LPRs. Pet. App. 416a-417a. Many are employed, with the majority working in low-skilled service, construction, and production occupations. *See* Jeffrey Passel & D'Vera Cohn, *Share of Unauthor-*

ized Immigrant Workers 4-5, Pew Research Center (Mar. 26, 2015) (Passel & Cohn, *Immigrant Workers*). And many of these long-term residents have forged other substantial ties to their communities, making them unlikely to commit offenses or otherwise threaten public safety.

Intervenors-Respondents are representative of this population. They are residents of Texas who immigrated from Mexico between 1999 and 2003, have U.S. citizen children and no criminal record, and work hard to care for their families and participate in their communities. J.A. 499-507. Jane Doe #1 has two minor U.S. citizen children, volunteers in her church and on school field trips, and helps her husband support their family by making and selling tamales and other food, and by doing catalog sales. J.A. 499-501. Jane Doe #2 is the primary caretaker of her two U.S. citizen children—a four-year-old daughter and a son in the sixth grade—and her mother, who suffers from Alzheimer's disease. She volunteers in her church, which she attends every Sunday, and in her daughter's Head Start program. She is also currently studying for her GED. J.A. 502-504. Jane Doe #3 supports herself and her two-year-old U.S. citizen daughter by making and selling food, and by selling items at a flea market. J.A. 505-507.

For these three women, potential eligibility for deferred action under the DAPA Guidance means the prospect of obtaining a temporary reprieve from the threat of removal and from the fear that their children will join the ranks of the estimated 88,000 U.S. citizen children separated from their parents by removals between 1997 and 2007 alone. American

Immigration Council, *The Ones They Leave Behind* 1 (Apr. 26, 2010). Though this reprieve would not provide any legal status, pathway to citizenship, or defense to removal, if the Guidance is implemented the Jane Does would be able to apply for deferred action in the hope of obtaining some temporary certainty in their lives and the lives of their children.

B. The Secretary Has Long-Standing Authority To Make Relief From Removal Available To Undocumented Immigrants, Including On A Class-Wide Basis

1. "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 132 S. Ct. at 2498, 2506. That power includes vast Executive discretion over the removal system. *Id.* Congress has recognized this authority, charging the Secretary "with the administration and enforcement of [the INA] and all other laws related to the immigration and naturalization of aliens," 8 U.S.C. § 1103(a)(1), having "control, direction, and supervision of all [DHS] employees," *id.* § 1103(a)(2), and "establish[ing] such regulations . . . as he deems necessary for carrying out his authority[.]" *Id.* § 1103(a)(3). This Court has long recognized that the Executive's discretion over removal policy "stems not alone from legislative power but is inherent in the executive power." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (citations omitted). The discretionary authority over removals is inherently executive because it "embraces immediate human concerns" and "involve[s] policy choices that bear on this Nation's international relations." *Arizona*, 132 S. Ct. at 2499.

To be sure, Congress is "entrusted exclusively" with the authority to create "[p]olicies pertaining to the entry of aliens and their right to remain here," and the Executive must follow these policies. *Id.* at 2507 (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954) (alterations omitted). But Congress has delegated to the Secretary responsibility for "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). Thus, unless Congress has explicitly addressed a particular issue, the Secretary has discretion to create policy in enforcing laws, directing employees, and establishing regulations. *Cf. Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005).

2. The Executive has exercised this policy discretion repeatedly over the last century. Most relevant here, the Secretary has frequently exercised authority over removal policy by granting discretionary relief from removal to undocumented immigrants, often through what is referred to as "deferred action."

a. Originally known as "nonpriority status," deferred action is a form of discretionary relief, developed internally by INS, under which the agency "may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (quoting 6 Charles Gordon et al., Immigration Law and Procedure § 72.03[2][h] (1998)). As originally formulated, INS did not announce any transparent standards for granting deferred action, and it was not clear under what circumstances it had been granted; recipients simply received notice that removal was indefinitely deferred. Geoffrey Heeren, *The Status of Nonstatus*,

64 Am. U. L. Rev. 1115, 1149-50 (2015); Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J. 243, 245-50 (2010). But after 1975, INS issued guidance known as the Operations Instructions to channel agency discretion in granting deferred action on a case-by-case basis. Wadhia, *supra*, at 248. The agency instructed that deferred action should be granted where "adverse action would be unconscionable because of the existence of appealing humanitarian factors." *Id.* Listed factors included the immigrant's age, length of presence and family status, and whether the immigrant was involved in criminal activities. *Id.*

INS modified these Operations Instructions in 1981 to state that deferred action was "in no way an entitlement." *Id.* at 250 (quotation omitted). At the same time, it promulgated the first regulation making recipients of deferred action and other forms of discretionary relief eligible to apply for work authorization. *See* 46 Fed. Reg. 25,079-81 (May 5, 1981) (codified as 8 C.F.R. § 109.1(b)(4)-(7) (1982)). Since that time, all recipients of deferred action have been eligible to apply for work authorization, first under that regulation and later under 8 C.F.R. § 274a.12(c)(14).

By 1999, deferred action was so established that this Court described it as the Executive's "regular practice . . . of exercising [prosecutorial] discretion for humanitarian reasons or simply for its own convenience." *Reno*, 525 U.S. at 483-84 (quotation and citation omitted); *see also* J.A. 239-263 (2000 memorandum updating standards for prosecutorial discretion, including deferred action). While individual-

ized, these grants have been extensive, with over 6,000 and 9,000 grants in fiscal years 2013 and 2014, respectively. Heeren, *supra*, at 1152 n.195.

b. Beginning in the 1990s, INS began expanding the use of deferred action, guided by agency policy statements, as a mechanism to address problems requiring class-wide solutions. For example, after the 1994 passage of the Violence Against Women Act (VAWA) created a means for certain immigrant domestic violence victims to file "self-petitions" for LPR status, INS concluded that many petitioners were waiting years to receive their visas, threatening their ability to remain in the country and work legally. *Id.* at 1153-54.

The agency solved this problem using targeted deferred action guidance. It centralized processing of VAWA self-petitions, ensuring that petitions would be handled consistently by experienced staff familiar with the relevant issues and target population, and it issued guidance for staff considering VAWA petitioners for deferred action. J.A. 216-228. This guidance provided specific instructions—that "VAWA cases generally possess factors that warrant consideration for deferred action" and "the exercise of discretion to place these cases in deferred action status will almost always be appropriate"—but reiterated that staff should apply deferred action on an individualized "case-by-case basis." J.A. 219-221. The practice of directing employees to focus case-by-case grants of discretion on a target population was successful, and "by the end of 1999, the INS began to grant deferred action routinely to all VAWA self-petitioners residing in the United States with approved petitions who had not yet adjusted status and

who were not in removal proceedings." Heeren, *supra*, at 1153.

The practice also prompted a reaction, after a quarter-century of silence, from Congress, which addressed deferred action for the first time in 2000. Instead of disapproving INS's actions, Congress endorsed and expanded deferred action, concluding that certain immigrants who had aged out of VAWA eligibility would *also* be "eligible for deferred action and work authorization." Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, § 1503(d)(2), 114 Stat. 1464, 1522. Following this congressional endorsement, between 2000 and 2011, INS and later DHS issued as many as 67,000 grants of deferred action to VAWA self-petitioners. Heeran, *supra*, at 1154.

The VTVPA also created "T" and "U" visas for victims of human trafficking and certain other crimes. 8 U.S.C. §§ 1101(a)(15)(T)(i), (U)(i). Like it had with VAWA self-petitioners, INS acted unilaterally to extend deferred action and other forms of relief to applicants for these visas. J.A. 229-238. Subsequently, noting inconsistent treatment of applicants, DHS instructed all applications to be processed at one location to ensure "a more unified, centralized approach." William Yates, *Centralization of Interim Relief For U Nonimmigrant Status Applicants* 1-2 (Oct. 8, 2003). As with VAWA, agency employees were instructed to consider each application "individually, based on all of the facts present," but also that the applicants "generally possess[ed] factors that warrant consideration for deferred action." *Id.* at 2. Between 2000 and 2007, some 7,500 U-visa applicants who submitted prima facie evidence of el-

igibility received deferred action. Heeren, *supra*, at 1155. Again, Congress acknowledged and endorsed this arrangement. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060.

With approval from Congress, use of deferred action continued to expand into the twenty-first century. DHS has unilaterally chosen to target several different classes of immigrants for deferred action. *See, e.g.*, J.A. 68 (foreign students who failed to maintain status due to Hurricane Katrina); J.A. 69 (spouses of certain deceased U.S. citizens). Congress also enacted several statutes deeming additional classes of people "eligible for deferred action," including certain family members of LPRs killed in the September 11, 2001 terrorist attacks and U.S. citizens killed in combat. USA PATRIOT Act, Pub. L. No. 107-56, § 423(b), 115 Stat. 361; National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1694-95; *see also* REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2)(B)(viii), 119 Stat. 231, 313.

Most importantly, Congress has never disapproved of or limited the Secretary's authority to grant deferred action. J.A. 72. To the contrary, all the foregoing legislation was enacted with the understanding that the Secretary has a baseline authority to grant deferred action. Both this legislation and the undisturbed uses of deferred action demonstrate that the Secretary's authority has never been limited to simple *ad hoc* relief granted by the undirected discretion of low-level employees. Rather, it has fully encompassed the authority to make policy-based decisions and issue guidance directing

employees to target individualized discretion at specific classes of immigrants.

3. Deferred action is not the only example of discretionary relief used to target a specific population. Since the 1960s, the Executive—with Congress's blessing—has implemented several discretionary relief practices that operate almost identically to deferred action by allowing relief from removal on a class-wide basis, most notably the Family Fairness initiative of the Reagan and first Bush administrations.

Known originally as "extended voluntary departure," these initiatives first arose in the 1960s and 1970s "as a class-based form of relief from deportation" under which INS postponed removal and allowed work authorization. Adam Cox & Cristina Rodríguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104, 122 (2015) (Cox & Rodríguez 2015). Its use declined after the 1980 Refugee Act, only to be reintroduced in the late 1980s under the label "deferred enforced departure." Heeren, *supra*, at 1138-39. The Executive has used these forms of relief to stay removal and allow applications for work authorization for large classes of people, including some 250,000 Cuban nationals in 1977, 80,000 Chinese nationals after the June 1989 Tiananmen Square crackdown, 190,000 Salvadoran nationals in 1992, 40,000 Haitian nationals in 1997, and 3,600 Liberian nationals in 2007. J.A. 209-212.

The Reagan and first Bush administrations made the most expansive use of extended or deferred departure through the Family Fairness initiative. In the 1986 Immigration Reform and Control Act (IR-

CA), Congress created a pathway to legal status for millions of undocumented immigrants, but it also chose to exclude from that pathway many of those immigrants' spouses and children. Cox & Rodríguez 2015, *supra*, at 120-22.; S. Rep. No. 99-132, at 16 (1985) (Senate Judiciary Committee report stating family members would have to "wait in line"). A subsequent bill to amend IRCA and create a path to status for family members was voted down, with IRCA's sponsor attacking it as a "second amnesty" that would "destroy[] the delicate balance of [IRCA]." 133 Cong. Rec. 26,876, 26,882-83 (1987); S. Amdt. 894 to S. 1394, 100th Cong. (1987), *available at* 133 Cong. Rec. 26,918.

Yet, two weeks after the amendment failed, the Reagan Administration announced the Family Fairness initiative to grant extended voluntary departure to many of the family members who would have been protected under the amendment. Alan Nelson, *Legalization and Family Fairness* 4-5 (Oct. 21, 1987). From late 1987 through 1990, INS expanded the initiative, eventually making deferral of removal and work authorization available to some 1.5 million undocumented immigrants, approximately 40% of the total undocumented population at that time. J.A. 65, 95; J.A. 188-189; J.A. 213-215. Congress eventually endorsed Family Fairness and granted a pathway to status for the affected family members. Cox & Rodríguez 2015, *supra*, at 121; Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5029-39.

C. The Secretary Issues The Guidance To Bring The Removal System In Line With Congressional Priorities And Promote Uniform Enforcement

1. Challenges Posed By Limited Congressional Appropriations

Like the discretionary relief programs that preceded it, the Guidance is an attempt to respond to a pressing problem in immigration enforcement. The undocumented population has grown from roughly 3.5 million people in 1990 to approximately 11 million today, after stabilizing in 2007. Marc Rosenblum & Ariel Ruiz Soto, *An Analysis of Unauthorized Immigrants* 4, 6, Migration Policy Institute (Aug. 2015); Jeffrey Passel & D'Vera Cohn, *Unauthorized immigrant population stable for half a decade*, Pew Research Center 1-2 (July 22, 2015). But Congress only appropriates enough funds for DHS to remove approximately 400,000 immigrants each year. J.A. 40, 55.

Although the undocumented population is much larger than it was two decades ago, it now consists mostly of long-term residents, not new entrants. Specifically, between 2003 and 2013, the proportion of the adult undocumented population that has been U.S. residents for 10 years or more increased to 62%, while the proportion who have been residents for less than five years declined to 15%. Jeffrey Passel et al., *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled* 2-3, Pew Research Center (Sept. 3, 2014). Many of these long-term residents, like the Jane Does, work in low-skilled occupations and have U.S. citizen children. Passel &

Cohn, *Immigrant Workers*, *supra*; J.A. 499-507.

Against this backdrop of insufficient funding, Congress instructed DHS in 2007 to "present[] a methodology [ICE] will use to identify and prioritize for removal criminal aliens convicted of violent crimes." Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 2050-51 (2007). Subsequently, in 2009 Congress instructed DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime," an instruction it has since routinely included in DHS appropriation acts. DHS Appropriations Act, 2010 Pub. L. No. 111-83, 123 Stat. 2149 (2009); Pet. App. 451a.

Initially, DHS responded by ramping up enforcement. Indeed, from 2009 on, the Obama Administration conducted more removals than any previous administration in American history. *See* Jason A. Cade, *Enforcing Immigration Equity*, 84 Fordham L. Rev. 661, 690-91 (2015); *Barack Obama, Deporter-in-Chief*, The Economist, Feb. 8, 2014; J.A. 108 (438,000 immigrants removed in 2013). However, because only about half these removals were of immigrants with criminal records, and even many of those had only committed immigration-related offenses or traffic offenses, DHS needed to create new mechanisms to focus enforcement resources on high-priority targets. *See* Cade, *supra*, at 691.

2. The Failure Of Secure Communities And The Success Of DACA

One initiative was the program known as Secure Communities. Commenced in late 2008, Secure Communities sought to increase information-

gathering to identify and prioritize removal of immigrants with serious criminal records. ICE, *Secure Communities Standard Operating Procedures* 1 (*Secure Communities SOP*); Adam Cox & Thomas Miles, *Policing Immigration*, 80 U. Chi. L. Rev. 87, 93 (2013). Under Secure Communities, fingerprints of all individuals arrested by local law enforcement in participating jurisdictions were automatically forwarded to DHS and screened against federal databases of noncitizens. Cox & Miles, *supra*, at 94. If an arrestee's prints matched a known noncitizen, Immigration and Customs Enforcement (ICE) would then determine whether to issue a detainer, requesting that law enforcement hold the individual for 48 hours to allow ICE to take custody. *Secure Communities SOP*, *supra*, at 4-5; Cox & Miles, *supra*, at 94. Participation by local jurisdictions in this screening process was mandatory, and the program was eventually extended to nearly every jurisdiction in the United States. Cox & Miles, *supra*, at 96-99.

But even with its priority system in place, DHS eventually concluded that Secure Communities failed to promote the congressional goal of prioritizing removals of serious criminals. J.A. 529-530. While many serious criminals were removed, ICE's issuance of detainers was largely indiscriminate, resulting in the removal of enormous numbers of low-priority and non-priority immigrants, including many who had committed no criminal offense. *Secure Communities SOP* 5, 8; Cade, *supra*, at 690-91. Through early 2011, 60% of removals through Secured Communities were not of serious criminals, but of individuals who had committed minor crimes, traffic offenses, or "non-criminal immigration vio-

lat[ions]." ICE, *Secure Communities IDENT/IAFIS Interoperability Monthly Statistics* 2 (May 23, 2011). Even as late as fiscal year 2014, 44% of the 315,943 immigrants removed by ICE had never been convicted of any crime, let alone a serious one. J.A. 143-144. At the same time, the immigration-court backlog surged to unprecedented levels. In 2014 alone, over 400,000 persons faced formal removal proceedings, and the average number of days to resolve each case rose to over 560. Cade, *supra*, at 693-94; TRAC Immigration, *Average Time Pending Cases*. The removals of low-priority immigrants, especially of long-term residents with children, also prompted a significant backlash against the program, leading many local jurisdictions to cease honoring ICE detainers and heightening distrust of law enforcement in immigrant communities. Homeland Security Advisory Council, *Task Force on Secure Communities Findings and Recommendations* 16-17, 21-24 (Sept. 2011).

The failure of Secure Communities made clear that ICE needed some other mechanism to focus enforcement on high-priority cases. An early attempt to create such a mechanism came in 2011, when ICE Director John Morton promulgated two guidance memoranda ("Morton Memos") to help direct ICE officers and attorneys in making more productive use of prosecutorial discretion, including deferred action. *See* John Morton, *Exercising Prosecutorial Discretion* (June 17, 2011) (Morton I); John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011). The Morton Memos listed about 20 non-exclusive factors that could be used in determining whether to grant discretionary relief,

including "civil immigration enforcement priorities," "length of presence in the United States," "criminal history," "national security or public safety concern[s]," and "whether the person has a U.S. citizen or permanent resident spouse, child, or parent." Morton I, *supra*, at 4.

However, the Morton Memos were unsuccessful. Discretion was exercised too infrequently and on an inconsistent basis around the country. Cade, *supra*, at 691-94 (noting only 38,000 removal cases closed between October 2012 and August 2014, concentrated in a few jurisdictions); Julia Preston, *Deportations Under New U.S. Policy Are Inconsistent*, N.Y. TIMES (Nov. 12, 2011). Moreover, because they focused on ICE enforcement officers and prosecuting attorneys, the Memos did not divert enforcement resources before they were expended against low-priority immigrants. Overall, the Memos failed to focus resources on high-priority targets. Cox & Rodríguez 2015, *supra*, at 189-90.

With these failures behind it, in June 2012, DHS decided to focus its enforcement efforts with what became known as the DACA guidance. This guidance instructed DHS employees to consider two-year grants of deferred action for certain undocumented individuals who came to the United States as children. J.A. 102-106. It stated that doing so was "necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities." J.A. 103. Like all grants of deferred action, grants under DACA "confer no substantive right, immigration status or pathway to citizenship" and recipients become eligible to apply for

work authorization under 8 C.F.R. § 274a.12(c)(14). J.A. 106.

In issuing the DACA guidance, the Secretary set forth five specific eligibility criteria for applicants and instructed employees to consider, on a case-by-case basis, applicants meeting those criteria for discretionary grants of deferred action. J.A. 103. In so doing, DHS avoided the pitfalls that had so undermined the Morton Memos. By providing specific, transparent criteria to use while making individualized decisions, the DACA guidance channeled the Secretary's discretion to support the priority system established, reducing arbitrary and inconsistent decisionmaking. Perhaps most importantly, like the VAWA and U-visa initiatives before it, the DACA guidance created a process by which U.S. Citizenship and Immigration Services (USCIS) could accept *proactive* applications for deferred action from immigrants meeting the criteria. J.A. 102-106. In this way, immigrants could come forward, register, and be counted without diverting enforcement resources, allowing DHS to expend these resources on high-priority targets and away from those identified, for a limited period, as low priorities for removal.

By late 2014, it was apparent that DACA was a success. J.A. 273 (766,277 individuals came forward to identify themselves to DHS and 636,324 applications were approved through December 19, 2014). This success made the Secretary's next step clear.

3. The Secretary Issues The DAPA Guidance

On November 20, 2014, the Secretary, acting in light of the preceding years' lessons, issued several new guidance memoranda that (1) discontinued Se-

cure Communities; (2) replaced it with the new Priority Enforcement Program (Prioritization Memorandum); and (3) issued the DAPA Guidance that is the subject of this suit. J.A. 529-534; Pet. App. 411a-429a. The Prioritization Memorandum and the Guidance work in tandem. The Prioritization Memorandum maintains the priority system of Secure Communities but replaces detainers with "requests for notification" and more effectively channels those requests toward high-priority targets. J.A. 529-534; Pet. App. 420a-429a.

But the experience of Secure Communities and the Morton Memos shows that an articulated priority system and unguided prosecutorial discretion, without more, do not allow DHS to properly focus resources on high-priority targets. For that focusing mechanism, the Secretary issued the Guidance to expand DACA and allow grants of deferred action for non-priority parents of U.S. citizens and LPRs. Pet. App. 412a-419a. As with DACA and every other grant of deferred action, deferred action under the Guidance "confers no substantive right, immigration status or pathway to citizenship" and "may be terminated at any time at the agency's discretion." Pet. App. 413a, 419a. These grants mean only that recipients would be temporarily moved outside the scope of DHS's immediate enforcement efforts, subject to revocation.

Like DACA, the Guidance systematically channels the Secretary's discretion by creating "a process . . . for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis[.]" Pet. App. 416a-417a. This DAPA process imposes six primary eligibility criteria. Applicants must

(1) be the parent to a U.S. citizen or LPR; (2) have resided in the United States since January 1, 2010; (3) have been physically present in the United States on November 20, 2014, and be present when applying; (4) have no lawful immigration status; (5) not be an enforcement priority under the Prioritization Memorandum; and (6) "present no other factors that, in the exercise of discretion, make[] the grant[s] of deferred action inappropriate." Pet. App. 417a. Each applicant must submit biometrics for a background check and pay fees. Pet. App. 417a-18a. Of the 11 million undocumented immigrants, roughly 4 million would be eligible for DAPA. J.A. 95-96. With these applicants registered and classified, DHS could focus resources on identifying those within the reduced pool of unaccounted-for undocumented immigrants, to determine which of those are high priorities for removal.

D. Eligibility For Work Authorization And Other Benefits Arises By Operation Of Existing Law, Not From The Guidance

Recipients of deferred action under the Guidance would be eligible to apply for work authorization. That eligibility comes not from the Guidance itself but from operation of an existing regulation the Reagan Administration promulgated through notice-and-comment rulemaking. *See* 8 C.F.R. § 274a.12(c)(14). This regulation makes eligible to apply for work authorization "[a]n alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment." *Id.* A version of that regulation has been in place since 1981, and *all*

recipients of deferred action are eligible to apply by virtue of it. 46 Fed. Reg. 25,079-81 (May 5, 1981).

Receiving deferred action can have several other effects, all of which arise under existing law rather than the Guidance itself. A recipient of deferred action will not accrue time for purposes of the 3- and 10-year admissibility bars in 8 U.S.C. § 1182(a)(9)(B); in practice, this will very rarely be applicable since most recipients will have already triggered those bars. *See* 8 U.S.C. § 1182(a)(9)(B)(i)-(ii). Recipients of deferred action are generally ineligible for most federal public benefits as they are not "qualified alien[s]." 8 U.S.C. § 1611(a). They can theoretically become eligible (if they meet all other eligibility requirements, including working and remaining in the United States long beyond the time period the Guidance authorizes) for certain Social Security, Medicare, and railroad-retirement benefits. *See* 8 U.S.C. § 1611(b)(2)-(4); 8 C.F.R. § 1.3(a)(4)(vi).

SUMMARY OF THE ARGUMENT

The Guidance does not itself grant deferred action or make deferred action recipients eligible for work authorization. Instead, it sets forth criteria to use in making case-by-case grants. That is an entirely legal exercise of the Secretary's authority, and for this reason Respondents' suit fails.

I. Respondents' suit should be dismissed for lack of standing. With no judicially cognizable interest in immigration enforcement decisions, Respondents have an exceptionally high burden to prove standing and show that they are not merely trying to use the federal courts to adjudicate a generalized, political grievance with an Executive decision in an area of

law that is exclusively within the purview of the federal government. But their central alleged injury—that the Guidance might increase Texas's costs of operating its driver's license program—fails to satisfy multiple elements of the test for standing.

Texas's projected costs are based on a chain of conjectural prospective events that are not certainly impending. While the ordinary, incremental cost of issuing licenses appears to be profitable for the State, Texas claims it might need to hire new employees and open new offices to accommodate a large influx of license applicants if the Guidance is implemented. Texas can prove neither that these projected costs are *certainly* impending nor that they are fairly traceable to the Guidance. Furthermore, it is mere conjecture that Texas would suffer a *net* negative to its budget. Implementing the Guidance would not only increase the number of insured, licensed drivers on Texas roads—a public good—but is expected to increase Texas's tax revenues, particularly of gasoline taxes as new legal drivers take to the roads. The State's projected budgetary costs are insufficient for standing. This conclusion is unaffected by *Massachusetts v. EPA*, 549 U.S. 497 (2007), for Respondents have no quasi-sovereign interests implicated by the Guidance and no specific procedural right to challenge it.

Holding the projected budgetary harms to be sufficient for standing would allow States to sue to halt any federal decision that might negatively impact a single State's budget. This would paralyze immigration enforcement and render agencies vulnerable to suit in many other kinds of cases as well.

II. The APA claims are not reviewable because the Guidance sets forth policies and criteria for exercising prosecutorial discretion in immigration enforcement, an area that is committed to agency discretion by law. Decisions whether to enforce the immigration laws are presumptively unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985), because such decisions implicate questions within DHS's expertise, particularly the question of how to focus scarce resources in prioritizing immigrants for removal. Respondents cannot rebut that presumption, especially since Congress has not provided any guidelines to assist courts in reviewing immigration enforcement decisions, and it is highly unlikely that Congress intended such decisions, which implicate Executive authority over foreign affairs, to be reviewable in Court. That the Guidance may apply to a large number of immigrants is neither unprecedented nor transformative with respect to reviewability. Respondents are simply wrong that grants of deferred action under the Guidance confer some sort of new status or other benefits, or that they are somehow different from every other grant of deferred action over the past half-century.

III.A Respondents' APA claims also fail on the merits. The Guidance is exempt from the requirements of notice-and-comment rulemaking because it is a general statement of policy. The APA distinguishes between "legislative" rules—which carry legal force and are subject to notice-and-comment procedures—and "non-legislative" policy statements, which are not. The Guidance has the twin hallmarks of a non-binding policy statement. It operates only prospectively, advising DHS employees of crite-

ria to use in evaluating future applications for deferred action. Moreover, it is an exercise of discretionary power. It memorializes the Secretary's policy decision to channel discretionary relief toward a population of low-priority immigrants, and it also guides DHS in exercising discretion on a case-by-case basis.

The court of appeals was wrong to disregard as pretext the Guidance's express language reserving discretion, and to instead base its decision on speculation about how the Guidance would be applied in the future. The decision below would set a dangerous rule that would dissuade agencies from making policy statements at all, resulting in unwritten and arbitrary enforcement policies—precisely the outcome that the Guidance was designed to prevent.

III.B. The Guidance was a lawful exercise of the Secretary's discretionary authority over immigration enforcement because it only sets criteria to be applied in individual cases but does not grant anything to any given immigrant. Respondents concede that the Secretary could lawfully decline to remove each and every immigrant who meets the Guidance's eligibility criteria, but instead argue that the Guidance confers immigrant status and benefits. It does not. The "lawful presence" that results from deferred action is not a "status," for the Guidance confers no rights, provides no defense to removal, and can be revoked at any time.

Likewise, the Guidance does not convey benefits or eligibility for benefits. Eligibility for work authorization arises under a preexisting regulation promulgated by notice-and-comment rulemaking, and re-

cipients of deferred action must separately apply for work authorization. Similarly, any eligibility for other programs, including Social Security and Medicare, comes from operation of other law, not the Guidance. Congress could always act to limit DHS's exercise of enforcement authority. But until it does, the Guidance is a lawful exercise of the Secretary's authority.

IV. Respondents have no claim under the Take Care Clause, for the question of whether the Secretary faithfully executed the law simply recapitulates the substantive APA analysis. But even if Respondents' purported constitutional claim did not simply reiterate their statutory claim, this Court should hold that the Take Care Clause does not allow Respondents to challenge the Guidance.

The Take Care Clause helps define the separation of powers—ensuring that the Executive has discretionary authority to execute the laws. It does not grant a claim or cause of action to challenge an Executive act. Moreover, even if Respondents could bring a claim under the Clause, in this case their claim would be a non-justiciable political question. Whether the Executive faithfully executed the laws is not a question given to judicial resolution, because there are no judicially discoverable or manageable standards for resolving the "faithfulness" of an Executive decision regarding the exercise of prosecutorial discretion in immigration enforcement.

Finally, if this Court does address the issue, it should hold that the Guidance was a faithful attempt by the Secretary to execute the law. The Guidance is amply justified by the practical impera-

tives of immigration enforcement, which compelled the Secretary to use the Guidance to channel case-by-case grants of deferred action toward low-priority immigrants so that enforcement resources could be focused on prioritizing removals of serious criminals. The Guidance allows the Secretary to faithfully execute the nation's immigration laws by bringing the removal system in line with congressional priorities.

ARGUMENT

The Guidance simply provides criteria to apply on a case-by-case basis in deferring removal of low-priority immigrants like Intervenors-Respondents Jane Does. Under the Guidance, no immigrant will receive deferred action unless the individual application demonstrates that a grant is a justifiable exercise of prosecutorial discretion. This guidance in exercising discretion is entirely lawful, and Respondents have no basis for challenging it. Instead, they begin with a false premise. Respondents incorrectly argue that the Guidance itself grants immigration status and a host of benefits to undocumented immigrants like the Jane Does. But the Guidance does *not* create a pathway to lawful status or citizenship, bestow benefits, or provide any legal rights or defenses. Pet. App. 413a, 419a. Even when an immigrant receives deferred action, postponement of removal can be revoked at any time, at the Secretary's discretion. And although recipients could also *apply* for work authorization and may become eligible for certain other benefits, that eligibility arises by operation of other, well-established laws, not the Guidance itself. Respondents' misconception of the Guidance undercuts each of their arguments.

I. RESPONDENTS HAVE NO STANDING TO CHALLENGE THE GUIDANCE

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent" Respondents from using "the judicial process . . . to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). To invoke the judicial power, they must first, like all litigants, establish standing by showing that the Guidance will injure them in a way that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Id.* at 1147 (quotation and citation omitted).

In this case, Respondents have an especially high burden to prove standing because they challenge the Guidance, which does not regulate States directly or have binding legal effect, but merely provides instructions and criteria to use in exercising prosecutorial discretion. States, like private persons, have no judicially cognizable interest in the enforcement of immigration law generally, much less in the "prosecution or nonprosecution" of others. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Where, as here, the "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed" to show standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (emphasis original). Moreover, because Respondents challenge a policy statement that has not yet been implemented, they must show that the alleged projected injury is "*certainly* impending." *Clapper*, 132 S. Ct. at 1147 (emphasis

original, quotation and citation omitted). They cannot do so.

Respondents believe that the Executive's chosen method for focusing removals on high-priority targets is misguided. J.A. 31 (Am. Compl. ¶ 61). Indeed, Respondents admit that they filed suit to stop the Executive's preferred enforcement policy *because* immigration is a subject over which they themselves have no authority to legislate. J.A. 34 (Am. Compl. ¶ 69). This is a quintessential generalized, political grievance, and as this Court has long stated, federal courts are not the "forum in which to air [one's] generalized grievances about the conduct of government or the allocation of power in the Federal System." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982) (quotation and citation omitted). Respondents have no more concrete or particularized injury than does any private citizen who disagrees with the Executive's immigration enforcement policies, and they cannot manufacture standing by claiming conjectural costs that are not certainly impending. *Lujan*, 504 U.S. at 573-74.

A. The Alleged Costs Of Issuing Driver's Licenses Are Insufficient For Standing

1. The courts below found standing based on a single injury: Respondent Texas's projected costs of issuing driver's licenses to new recipients of deferred action.[1] Pet. App. 11a, 20a (court of appeals); Pet.

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[1] Respondents also argue that the Guidance will encourage increased immigration (though it only applies to immigrants who arrived before January 2010), which in turn, they claim, could eventually lead to additional State educational, health

App. 271a-272a, 298a, 309a (district court). Petitioners have argued that standing is lacking based on the fact that Respondents can charge applicants fees that cover the actual costs of issuing licenses. Pet. 14-18. Respondents, for their part, have countered that even being pressured to raise their fees to cover all costs is itself an injury sufficient for standing. Resps.' Br. Op. 14. But this Court need not resolve that dispute, for there is a preliminary, fundamental flaw in Respondents' suit: the costs they allege do not satisfy the requirements of standing in the first place.

a. Although the court of appeals accepted without scrutiny Texas's claim that implementing the Guidance would cause the State to spend at least $130 for each new license issued, a brief examination shows this conclusion to be baseless. Pet. App. 21a. The alleged costs are not based on the actual cost of issuing a driver's license today to a recipient of deferred action, but on speculation that Texas would have to embark on an aggressive employee-hiring and office-building program to process an influx of new applications. J.A. 377-82. Since no one can know for sure how many individuals will actually receive deferred action and apply for licenses, and because it is impossible to predict that any such expenditures would be due *only* to the Guidance instead of Texas's decision to simply expand its infrastructure, the alleged costs are neither certainly impending nor fairly traceable to the Guidance. *Clap-*

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care, and other expenditures. J.A. 31-33. However, neither court below found these alleged costs to be sufficient for standing, and they are even more attenuated than the alleged costs of issuing licenses.

per, 133 S. Ct. at 1151. Like the "speculative chain of possibilities" that was insufficient for standing in *Clapper*, 133 S. Ct. at 1148-49, these alleged costs are dependent on a "highly attenuated" chain of events that require "guesswork as to how independent decisionmakers will exercise their judgment." *Id.* at 1148-50.

Namely, for these costs to come to pass, (1) a substantial number of the DAPA-eligible immigrants living in Texas must apply for and receive a discretionary grant of deferred action from DHS; (2) immigrants receiving deferred action must then separately apply for and receive discretionary grants of work authorization from DHS by showing economic necessity; (3) immigrants receiving work authorization must then apply for Texas's driver's licenses; and (4) the volume and timing of applications must be such that Texas is forced to expend significant resources on new employees and office space.

None of these steps is *certainly* impending, but the last poses a particular bar. Critically, Texas has not claimed that the normal process of issuing licenses is revenue-negative. Indeed, in the normal course of business, license application fees generate a *profit* that funds all of the driver's license division's operations, including those unrelated to issuing licenses. *See, e.g.*, Tex. Dep't of Pub. Safety, *Operating Budget for Fiscal Year 2014* II.A.2, III.A.38, III.A.40, IV.D.5 (Dec. 1, 2013) (estimating fiscal year 2014 would see $125.3 million revenue on 6.1 million licenses and ID cards issued, on total costs of less than $124 million). Texas instead argues that the Guidance will cause such an influx of new applications (up to 520,000, though that itself is less than

10% of the estimated 6.1 million transactions processed in 2014) that the State will be forced to make new employee hires and open and equip new office space, expenditures beyond those incurred in the ordinary course of business. J.A. 379-81. This requires Texas to assume that the volume and rate of new applications will be high enough that existing system capacity is overwhelmed—an assumption that itself presumes that the rate of applications from *other* residents will not decline, and that Texas cannot simply reallocate existing resources to meet demand.

Article III standing is not satisfied by Texas's bare declaration that the Guidance will cause the State to incur future costs for new hires and capital expenditures that are outside the ordinary course of business. "[A] party seeking federal jurisdiction cannot rely on such speculative inferences to connect his injury to the challenged actions of the defendant[.]" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (quotations, citations, and alterations omitted). To hold otherwise would allow Texas to claim that it will "incur[] certain costs" as a reasonable reaction to a risk of harm" and thereby "manufacture standing . . . based on [its] fears of hypothetical future harm that is not certainly impending." *Clapper*, 133 S. Ct. at 1151.

b. Even if the projected driver's-license costs were certainly impending, issuing licenses is likely to lead to savings and revenue increases that will offset any costs. As this Court has explained in its taxpayer-standing cases, projected harms to a government's budget are often "conjectural or hypothetical," *Cuno*, 547 U.S. at 344 (quotations and citations

omitted), partially because governmental entities are special in that their many revenue sources can recoup costs in ways that an individual or corporation cannot. "When a government expends resources or declines to impose a tax, its budget does not necessarily suffer. On the contrary, the purpose of many governmental expenditures and tax benefits is to spur economic activity, which in turn *increases* government revenues." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 136 (2011) (quotation and citation omitted, emphasis original).

Such is the case with driver's licenses, which Texas chooses to offer as an unlimited, undifferentiated public good. By choosing to license drivers, Texas improves public safety and decreases costs by ensuring drivers will pass knowledge and driving tests, as well as vision examinations. 37 Tex. Admin. Code § 15.51-.53; AAA Foundation for Traffic Safety, *Unlicensed to Kill* 2, 13-15 (2011) (unlicensed drivers disproportionately responsible for fatal accidents). Licensing drivers also allows them to obtain insurance, which Texas requires, Tex. Trans. Code § 601.051(1), and which reduces unreimbursed accident costs. Kevin Johnson, *Driver's Licenses and Undocumented Immigrants*, 5 Nev. L.J. 213, 220-21 (2004). There is no allegation here (or logical explanation why) issuing licenses to recipients of deferred action would somehow be less beneficial for Texas than issuing licenses to its other residents. The Guidance would lead to a higher rate of insured, licensed drivers, assisting the State in lowering costs and achieving key public safety goals—hardly an injury sufficient for Article III standing.

Licensing drivers will also lead to increased tax

revenues. One recent study has projected that fully implementing the Guidance will increase Texas's tax revenues by almost $59 million per year. Lisa Gee et al., *Undocumented Immigrants' State & Local Tax Contributions*, Institute on Taxation and Economic Policy 5 (Feb. 24, 2016). More closely related to driver's licenses, even if Texas is unable to recoup any licensing costs it suffers from the $25-per-applicant fee alone, adding more legal drivers to the roads will result in increased gasoline tax revenues. Texas imposes a $0.20 per-gallon gasoline tax, and in 2011 the per-capita annual consumption in Texas was 464 gallons. *See* Tex. Comptroller of Pub. Accounts, *Texas Taxes and Tax Rates* (2015); Dep't of Energy, *Energy Consumption by Transportation Fuel in Texas* (2015). At these rates, over a three-year period of deferred action, the average recipient who had not previously been driving would likely pay $278.40 in gasoline taxes, while previously unlicensed drivers would be free from fear of arrest and detention and would likely drive more. This does not even consider other revenue streams that would be bolstered, such as vehicle-registration fees, title fees, and usage-based lubricant taxes. Tex. Comptroller Pub. Accounts, *Biennial Revenue Estimate* 34 (2014). Because any budgetary harm they would suffer is likely to be recouped, Respondents' allegations are too conjectural to establish standing.

2. *Massachusetts v. EPA*, 549 U.S. 497 (2007), does not relax the standing rules for Respondents. That case found "special solicitude" for Massachusetts's suit seeking review of the denial of a Clean Air Act rulemaking petition because Massachusetts was suing to protect its long-recognized quasi-

sovereign interests in State lands threatened by climate change, and because the Clean Air Act gave Massachusetts a specific procedural right to seek the requested relief. *See* 42 U.S.C. § 7607(b)(1); *Massachusetts*, 549 U.S. at 518-20 (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

There are no quasi-sovereign interests at stake here, and Congress has provided no specific procedural right for States to challenge immigration enforcement. *See* Pet. App. 103a (explaining why the APA cause of action alone is insufficient for "special solicitude") (King, J., dissenting). Moreover, the harm alleged in *Massachusetts* did not suffer from the flaws that beset Respondents' alleged budgetary costs. The greenhouse-gas emissions in *Massachusetts* were scientifically proven to cause a certain, undisputed evil, incrementally contributing to the harmful effects of climate change. *Massachusetts*, 549 U.S. at 521-25. Here, as noted, Respondents have failed to show that their alleged financial costs are certainly impending at all, or that whatever costs are incurred will not be offset by increased tax revenues. Their allegations are insufficient for standing.

B. Allowing Respondents Standing Would Paralyze Immigration Enforcement And Administrative Decisionmaking

Because nearly every Executive decision will have at least *some* incidental effect on a State's budget, if this Court holds Respondents have standing here, States will be able to challenge a wide swath of otherwise unreviewable Executive decisions, potentially crippling the administrative state.

1. Immigration Enforcement Decisions. Most obviously, States could sue to halt most grants of discretionary relief, including decisions to grant *ad hoc* deferred action, forms of voluntary departure, or parole. Indeed, Respondents have so far been unable to present a plausible argument why their standing theory could not in the future be used to challenge grants of deferred action to single individuals, so long as a plaintiff State could tie the grants to some projected budgetary cost.

Respondents' theory would also allow States that favor immigration to block future Executive decisions to target low-priority immigrants for removal. If a future administration reverses the Guidance and prioritizes Intervenors-Respondents and other non-criminal parents of U.S. citizen children for removal, a State like New York could sue to halt the removals as unlawful on the ground that Congress has ordered the Executive to "prioritize the identification and removal of aliens convicted of a crime[.]" Pet. App. 451a. Standing could be based on (among other costs) the loss in tax revenue from the removed immigrants, or on the increased costs of foster care that States would have to spend as the result of removing immigrant parents. *See* Applied Research Center, *Shattered Families* 22 (Nov. 2, 2011) (estimating at least 5,100 children in foster care whose parents had been detained or removed).

New York has approximately 231,000 DAPA-eligible immigrant parents. Migration Policy Institute, *Profile of the Unauthorized Population: New York* (2015). As of 2010, New York spent approximately $29,000 annually for each child in a foster boarding home. New York State Office of Children

& Family Servs., *Ten for 2010* 14 (2010). On these figures, even if only 1% of removals of immigrant parents were projected to result in a child entering foster care, New York could plausibly argue that an Executive decision to prioritize removal of immigrant parents would cause the State to incur up to $67 million per year in foster care costs. Applying Respondents' theory, that would be more than sufficient for New York to seek an injunction to halt removals.

2. Federal Definitions Adopted In State Law. Most States use federal standards to determine eligibility for State benefits, reimbursements, and other programs. If this Court holds the driver's-license theory sufficient for standing, States could challenge an array of Executive decisions that incidentally increase State costs. This would include any changes to the federal poverty guidelines, administered in part by the Office of Management and Budget, Census Bureau, and Department of Health and Human Services. *See* OMB Statistical Policy Directive No. 14 (May 1978); 31 U.S.C. § 1104(d); 42 U.S.C. § 9902(2). States tie a vast array of programs to the guidelines, most notably the constitutionally-required provision of counsel for indigent criminal defendants.[2] *See Gideon v. Wainwright*, 372 U.S. 335 (1963); Nat. Ass'n of Criminal Def. Lawyers, *Gideon at 50: Part 2* 8 (Mar. 2014); *e.g.*, Fla. Stat. § 27.52(2)(a)(1). If Respondents have standing simp-

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[2] Just a few of the other programs tied to the guidelines are state-funded school lunches, Cal. Educ. Code §§ 49531, 49552; 80 Fed. Reg. 17,026-17027 (2015), reduced handgun licensing fees, Tex. Gov't Code § 411.194, and subsidies for sterilizing household pets, N.H. Rev. Stat. § 437-A:3.

ly because the Guidance will increase the number of applicants for driver's licenses, then States would have standing to sue any time the federal poverty guidelines are changed.

Similarly, a number of States use the federal General Services Administration's mileage and per diem rates to reimburse State employees for travel expenses. *E.g.*, Ga. Code Ann. § 50-19-7; Colo. Rev. Stat. § 24-19.9-102. Those rates are set by the GSA under a general grant of authority, and they are frequently revised. *See* 5 U.S.C. §§ 5702, 5707. Any changes to these rates could increase State expenses and create standing to sue.

3. Other Agency Actions. Respondents' theory of standing would not only apply in the context of immigration or where a State ties its own law to a federal definition. Rather, it would "allow limitless state intrusion into exclusively federal matters—effectively enabling the states, through the courts, to second-guess federal policy decisions." Pet. App. 106a (King, J., dissenting). So long as a State could file a declaration claiming some impact to its budget, the State would have standing. That would allow challenges to many currently unreviewable decisions, especially those that result in an influx of new residents (such as a federal allocation decision funding a politically controversial project or facility located in the State), simply on the basis that the new residents would apply for licenses and other State services. If Respondents can use incidental budgetary costs to challenge (and win an injunction against) an internal DHS guidance memorandum on immigration enforcement policy, an area over which the Executive has exclusive authority, then there are

no real limits to the theory of standing that Respondents ask this Court to endorse.

II. THE GUIDANCE IS NOT REVIEWABLE UNDER THE APA

Respondents' APA claims are not reviewable because the Guidance does nothing more than establish uniform standards to apply in exercising prosecutorial discretion, a matter "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). As an "exercise in administrative discretion," *Reno*, 525 U.S. at 483-84 & n.9, deferred action is a temporary, revocable "decision not to prosecute or enforce" and is thus exempt from judicial review.[3] *Heckler*, 470 U.S. at 831.

The *Heckler* presumption that enforcement policy decisions are unreviewable is particularly applicable in the immigration context. Decisions to remove, or not to remove, involve a "complicated balancing of a number of factors which are peculiarly within [the Secretary's] expertise," including whether removal is consistent with policy priorities and a valuable use of its limited resources. *Id.* at 831-32. There are millions of removable immigrants, and given resource constraints DHS "cannot act against each technical violation" of the immigration laws. *Id.*

In light of this practical constraint, the Secretary

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[3] Likewise, because Respondents have no authority over immigration enforcement and no cause of action under the INA, their APA claims are unreviewable because their interests are not "arguably within the zone of interests to be protected or regulated by the [INA]." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see Arizona*, 132 S. Ct. at 2498-99, 2506.

has chosen to issue guidance to register, identify, and label, for a temporary period, certain cases as low priorities for removal. Like the agency in *Heckler*, DHS "is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* Moreover, because undocumented immigrants have no right to have removal deferred, enforcement decisions "do not infringe upon areas that courts are often called upon to protect." *Id.*; 8 U.S.C. § 1252(g). For these reasons, the Guidance, like all forms of agency nonenforcement, is presumptively unreviewable.

Respondents are unable to rebut this presumption; that can only be done in cases "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers" and the agency has affirmatively disregarded those guidelines. *Heckler*, 470 U.S. at 833. But Congress has not acted to limit the Secretary's authority to grant deferred action. Thus, the Secretary has complete discretion whether to commence removal proceedings against individuals like Intervenors-Respondents, *see Arizona*, 132 S. Ct. at 2506, and there is "no meaningful standard against which to judge" his decisions to defer removal. *Heckler*, 470 U.S. at 830. Deferred action is so open to discretion that it may be appropriately granted for "humanitarian reasons or simply for [the Executive's] own convenience," foreclosing judicial review. *Reno*, 525 U.S. at 484.

The extra deference due the Executive in the realm of immigration enforcement makes this an even weaker case for reviewability than the claims in *Heckler*. *Jama*, 543 U.S. at 348. Deferred action

and other forms of discretionary relief not only "embrace[] immediate human concerns[,]" but also "involve policy choices that bear on this Nation's international relations." *Arizona*, 132 S. Ct. at 2499. "The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy[.]" *Id.* The *Heckler* presumption is thus particularly strong here, as it is highly unlikely that Congress intended to allow challenges under the APA to federal immigration enforcement decisions. *See id.* at 2498 (foreign nations "must be able to confer and communicate . . . with one national sovereign, not the 50 separate States"); *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("power over aliens is of a political character and therefore subject only to narrow judicial review") (citation omitted). Allowing judicial review of the Guidance would impede the Executive's ability to manage immigration policy and all that it affects.

Respondents concede, as *Heckler* compels them to, that deferred action could be granted on a case-by-case basis to any or even all of the individuals covered by the Guidance's criteria, and that those grants would be unreviewable. Resps.' Br. Op. 20-21. They argue instead that *Heckler* is inapplicable because "DAPA would deem lawful the presence of millions of unauthorized aliens" and "the affirmative acts of granting lawful presence and work-authorization eligibility are reviewable." *Id.* Respondents' argument is twofold: that the Guidance must be reviewable because it constitutes a grant of deferred action to a class of immigrants, and that it conveys a legal status and benefits that the *ad hoc*

form of deferred action this Court endorsed in *Reno* does not. Both arguments miss the mark.

First, as noted, the Guidance does not grant deferred action to any individual, let alone to a class of individuals. Instead, it provides "specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis." Pet. App. 419a. That these criteria necessarily focus discretion on a class of low-priority immigrants with similar characteristics is irrelevant, for reviewability depends on the nature of the Executive action, not on the number of people it may affect. For decades, the Executive has established policies, within its enforcement framework, allowing large classes of immigrants to apply for individualized grants of deferred action and other forms of discretionary relief. *Supra* at 9-13. This rich historical record renders baseless Respondents' claim that the Guidance is reviewable simply because it has the potential to apply to a large number of immigrants.

Second, contrary to Respondents' assertion, *all* grants of deferred action, including those this Court endorsed in *Reno*, 525 U.S. at 483-84 & n.8, simply permit individuals to "be lawfully present" for the time specified but "confer[] no substantive right, immigration status or pathway to citizenship." Pet. App. 419a. As discussed *infra* at 50-51, what Respondents refer to as "lawful presence" is simply the condition of being a removable immigrant whom the Secretary knows is present and has temporarily declined to remove. Moreover, eligibility to apply for work authorization—the grant of which is itself discretionary—comes not from the Guidance but from a

Reagan-era regulation that Respondents do not challenge, promulgated after Congress specifically delegated to the Secretary the authority to define new categories of immigrants eligible to work. *See* 8 C.F.R. § 274a.12(c)(14); 8 U.S.C. § 1324a(a), (h)(3). Similarly, although deferred-action recipients can become eligible for other benefits, such as Medicare and Social Security, their eligibility for those benefits arises under unrelated statutes that impose additional eligibility criteria, including ten years of employment and continued presence in the United States until retirement age. *See* 8 U.S.C. § 1611(b)(2)-(4); 42 U.S.C. §§ 402(a), (y); 414(a)(1)-(2); 423(c)(1)(A); 426.

This Court recognized three decades ago that it is not the judiciary's role to review enforcement policies and decisions. *Heckler*, 470 U.S. at 832-33. The Guidance, like the individual deferred action decisions to which it applies, is precisely the kind of agency enforcement policy not subject to judicial scrutiny. Were it otherwise, *any* future grant of deferred action (on a class-wide or *ad hoc* basis) could be subject to judicial review under the APA. This would vastly expand the role of the judiciary—and that of States—in second-guessing the Executive's congressionally-endorsed exercise of federal prosecutorial discretion in immigration enforcement. Even if Respondents have standing, their APA claims are not reviewable.

III. RESPONDENTS' APA CLAIMS FAIL ON THE MERITS

A. The Guidance Is A General Statement Of Policy Exempt From Notice-And-Comment Requirements

Because the Guidance simply sets criteria to use in exercising discretion to grant or deny deferred action, it is a non-binding "general statement[] of policy" and thus does not require notice-and-comment rulemaking. 5 U.S.C. § 553(b)(A).

1. That an agency action is important or may affect a large number of people does not determine whether it must undergo notice-and-comment. The APA makes a "central distinction" between "legislative" or "substantive" rules, which carry legal force and thus require notice-and-comment procedures, and "non-legislative" interpretive rules, policy statements, and internal rules of organization or procedure, which do not. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979). A legislative rule, as an exercise of an agency's quasi-legislative authority, establishes a binding legal norm that "affect[s] substantial individual rights and obligations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). By contrast, a policy statement merely "advise[s] the public *prospectively* of the manner in which the agency proposes to exercise a *discretionary* power." *Chrysler*, 441 U.S. at 302 n.31 (emphasis added) (quoting *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947)).

The Guidance has both characteristics of a policy statement exempt from the notice-and-comment process. It operates only prospectively, advising the

Secretary's subordinates (and the public) of the criteria to use in evaluating future deferred action applications. The Guidance repeatedly stresses its prospective nature by noting that USCIS will "establish a process" for reviewing applications for deferred action "on a case-by-case basis" and "should begin accepting applications" within 180 days. Pet. App. 416a-417a. It states that, before immigration officials make any determinations, applicants must first file applications, submit biometric data, and undergo background checks. Pet. App. 417a-418a.

Likewise, the Guidance is an "exercise [of] a discretionary power" entrusted to the Secretary. *Chrysler*, 441 U.S. at 302 n.31. The "principal feature of the removal system is the broad discretion exercised by immigration officials," including the discretion not to pursue removal at all. *Arizona*, 132 S. Ct. at 2499. That discretion is exercised by the Secretary who, in every case, must make "a determination whether it is appropriate to allow [the] foreign national to continue living in the United States." *Id.* at 2506.

The Guidance also delegates to DHS employees the discretion to determine whether to grant deferred action in a particular case. Indeed, the Guidance embraces these employees' case-by-case discretion as an essential element of the decision-making process, making it clear that "the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis." Pet. App. 419a. Two of the six criteria that the Guidance directs the Secretary's subordinates to consider *by definition* require them to exercise individual discretion. Namely, they must determine (1) whether each

applicant is "an enforcement priority" based on the Prioritization Memorandum, and (2) whether each applicant presents any "other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Pet. App. 417a.

Because the Guidance operates both prospectively and with "room for further exercise of administrative discretion," it is a general statement of policy, not a legislative rule. *Batterton v. Marshall*, 648 F.2d 694, 706 (D.C. Cir. 1980). The Guidance lacks that "important touchstone" of legislative rules: an immediate legal effect on individual rights and obligations. *Chrysler*, 441 U.S. at 302. By its terms, the Guidance "confers no substantive right, immigration status or pathway to citizenship," and it does not guarantee that any individual will receive deferred action. Pet. App. 419a. Even when granted, deferred action is not itself an immigration status and does not automatically confer work authorization or any other legal benefit. While the Guidance certainly could be applied to affect many immigrants, that fact alone does not make it subject to the APA's notice-and-comment requirements.

2. The courts below erred in disregarding the Guidance's express language and concluding that its statements reserving discretion were "merely pretext." Pet. App. 56a. That conclusion rested on an analysis of evidence about DACA, another nonbinding policy statement not subject to notice-and-comment rulemaking, which uses other eligibility criteria to target a different population of immigrants. Pet. App. 56a-64a. In reaching its decision, the court of appeals misconstrued relevant case law and improperly conflated DACA with the DAPA

Guidance.

This Court has not precisely addressed the issue, but the circuit courts have stated that in determining whether an agency action "as a practical matter" establishes a legally binding norm, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000), courts should consider how a policy statement is applied in practice only when its "language and context . . . are inconclusive." *Pub. Citizen, Inc. v. Nuclear Regulatory Comm'n*, 940 F.2d 679, 682 (D.C. Cir. 1991). The court of appeals acknowledged that the Guidance's language unambiguously "instructed agencies to review applications on a case-by-case basis and exercise discretion[.]" Pet. App. 56a. The inquiry should have stopped there because "only subsequent adjudications [can] reveal" whether an agency has applied a policy statement in a legally binding manner. *Regular Common Carrier Conference of Am. Trucking Ass'ns, Inc. v. United States*, 628 F.2d 248, 252 (D.C. Cir. 1980). Intervenors-Respondents are aware of no other case where a policy statement has been declared binding as a practical matter before implementation. Pet. App. 131a (King, J., dissenting).

The court of appeals relied on speculation about how the Guidance would be applied, "extrapolate[ing]" evidence from the application of DACA while ignoring the critical differences between the two programs. Pet. App. 59a. The court of appeals ignored the two "additional discretionary criteria" contained in the Guidance that did not exist under the 2012 DACA initiative. Pet. App. 61a. As noted, those criteria would have a reviewing employee reject an application if the employee first determines,

in the exercise of discretion, that the applicant is an "enforcement priority" or presents any other factor that, "in the exercise of discretion, makes the grant of deferred action inappropriate." Pet. App. 417a. Instead of considering the importance of these criteria, the court of appeals focused entirely on language in the Guidance instructing USCIS to establish a "process, similar to DACA," for collecting DAPA applications and granting fee exemptions. Pet. App. 61a & n.139 (emphasis omitted). Similarities in *process* are irrelevant to predicting how employees will *substantively* evaluate DAPA applications using different eligibility criteria. Pet. App. 135a-136a (King, J., dissenting).

Even assuming that the Guidance's future application could be predicted accurately from the implementation of DACA, there is little to suggest that DACA has been implemented in a binding fashion. The court below, citing a lack of evidence about how many DACA denials were made for "discretionary" reasons, ruled that the fact that only 5% of DACA applications were denied showed that DACA was binding on the Secretary's subordinates. Pet. App. 56a-57a. But as the court of appeals itself acknowledged (without crediting the point), DACA applicants are "self-selecting," meaning that those likely to be eligible for deferred action made up the bulk of the applicant population. Pet. App. 60a. The DACA denial percentage is simply not a reliable indication of whether employees considering DACA applications exercised discretion in granting or denying deferred action.

The court of appeals' ruling on pretext creates the dangerous rule that a non-binding agency policy

statement becomes a legal rule subject to notice-and-comment simply because it is effective in guiding the exercise of discretion. If this rule stands, the risk that a policy statement will be held to constitute a legal rule will dissuade agencies from making policy statements at all, "perversely encourag[ing] unwritten, arbitrary enforcement policies." Pet. App. 129a (King, J., dissenting). That is exactly the problem that the Guidance was meant to combat by promoting transparency and uniformity in immigration enforcement while prioritizing removals of serious criminals. The Guidance was not required to undergo notice-and-comment rulemaking.

B. The Secretary Had Authority To Issue The Guidance And To Grant Work Authorization To All Recipients Of Deferred Action

The court of appeals incorrectly held that the Guidance violates statutory law. As discussed, *supra* at 7-12, 21-22, the Secretary has long had authority to grant deferred action and, separately, to grant work authorization to recipients of deferred action. The Guidance helps channel that authority, and while it has no legal effect itself, it provides instructions to temporarily defer removal on a case-by-case basis for low-priority immigrants like the Jane Does. The decision below contradicts the undisputed law and the Secretary's long-established practice of using discretionary relief targeted at certain populations to address pressing immigration issues. *See supra* at 9-13. Unless reversed, it will cripple the Secretary's "regular practice" of granting discretionary relief to improve enforcement efforts, and it will weaken the Secretary's control over the removal sys-

tem. *Reno*, 525 U.S. at 484-85; *Arizona*, 132 S. Ct. at 2506.

Respondents concede that the Secretary could lawfully decline to remove each and every immigrant who meets the criteria specified in the Guidance. *See* Resps.' Br. Op. 20-21; *see also* Pet. App. 43a, 44a, 69a n.156. This concession alone should doom Respondents' claim. But in an attempt to avoid this result, Respondents argue that the Guidance illegally confers status and benefits because it permits deferred action recipients to be "lawfully present" in the United States for a limited period of time and removes a barrier to eligibility for work authorization and other benefits. This argument both fails on the merits and ignores the fact that deferred action under the Guidance is no different in these respects from the hundreds of thousands of deferred removals and extended departures the Secretary and his predecessors granted during the past half-century.

1. A grant of deferred action does not constitute or confer any form of immigration status. Although deferred action makes the recipient lawfully present for the length of time removal is deferred, this so-called "lawful presence" is not an immigration *status*. Cf. Pet. App. 44a. Congress does not define "lawful immigration status" in the INA, 8 U.S.C. § 1101, but "legal *status* implies a right protected by law, [while] legal *presence* simply reflects an exercise of discretion by a public official." Pet. App. 222a (Higginson, J., dissenting) (emphasis original, quotation and citation omitted).

In this case, "lawful presence" results from having been identified as undocumented and formally

classified, for a temporary period, as a low priority for removal. Becoming "lawfully present" by receiving deferred action under the Guidance "does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States." Pet. App. 413a. Crucially, "[d]eferred action . . . may be terminated at any time at the agency's discretion." Pet. App. 413a. This point is determinative. While some forms of relief, like cancellation of removal, expressly convey LPR status and a defense to further removal proceedings, *see* 8 U.S.C. § 1229b, the simple condition of being lawfully present provides no defense to removal and can be revoked without notice or process at any time. *See Reno*, 525 U.S. at 484-85. As a result, grants of deferred action under the Guidance would not convey status as Respondents claim. To the extent there is any doubt about this point, the Secretary's determination that deferred action conveys no status or defense to removal is entitled to deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

2. Likewise, the Guidance does not convey eligibility for any benefits. The Guidance itself simply notes that recipients of deferred action may "*apply* for work authorization (which by *separate authority* [the Secretary] may grant)". Pet. App. 415a (emphasis added). Eligibility to apply for work authorization is actually conveyed by 8 C.F.R. § 274a.12(c)(14), which the Reagan Administration promulgated by notice-and-comment rulemaking.

This regulation is a statutorily-authorized exercise of the Secretary's powers, and the window to

challenge it closed years ago. *See* 28 U.S.C. § 2401(a). The INA gives the Secretary authority to define new categories of immigrants that are eligible to receive work authorization. Acting under the INA's delegation of authority in 8 U.S.C. § 1103, as early as 1981 the Secretary's predecessor promulgated final regulations making recipients of deferred action eligible to apply for work authorization. *See* 46 Fed. Reg. 25,079-81 (May 5, 1981). When Congress subsequently enacted IRCA in 1986, it reaffirmed and strengthened the Secretary's authority, delegating to the Secretary the express power to define categories of immigrants who are authorized to work, *in addition* to those authorized by statute. *See* 8 U.S.C. § 1324a(a), (h)(3). Thus, when the INA promulgated 8 C.F.R. § 274a.12(c)(14) in 1987 to make recipients of deferred action eligible to apply for work authorization, it did so with undisputed statutory authority.

Respondents wisely do not challenge Section 274a.12(c)(14), instead arguing that the Guidance is invalid because it allows immigrants to *obtain* work authorization. But Respondents fail to explain exactly what part of this arrangement is unlawful. If—as Respondents concede—it is lawful for the Secretary to grant deferred action, and if a regulation that Respondents do not challenge makes it lawful for the Secretary to grant work authorization to recipients of deferred action, then the arrangement is lawful. The availability of work authorization does not render the Guidance unlawful.

The same logic defeats Respondents' argument that the Guidance is unlawful because it makes recipients eligible for other benefits or quasi-benefits

like Social Security, Medicare, or cessation of accrual of "unlawful presence." *See* 8 U.S.C. § 1611(b)(2), 1182(a)(9)(B)(i); 8 U.S.C. § 1182(a)(9)(C)(i)(I); 8 C.F.R. § 103.12(a)(3)(i); 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2). Eligibility for all of these programs springs not from the Guidance itself, but from criteria set forth in the statutes and regulations giving rise to these programs.

Respondents attempt to undermine the Guidance by pointing to eligibility for benefits that it does not itself confer and which are validly granted by other laws. In the end, however, their reasoning only serves to demonstrate why the Secretary has allowed recipients of deferred action to apply for work authorization: deferring removal of individuals while denying them the ability to work legally would force them into the shadow economy, harming them and keeping wages depressed in the labor market.

3. As a matter of substance, the Guidance is no different from the many class-wide discretionary relief programs that came before it. If this Court agrees with Respondents that the Guidance is unlawful, its decision would radically constrain the Secretary's ability to allocate resources to best enforce Congress's chosen immigration policies, for the Guidance cannot be held unlawful without demolishing the legal underpinnings of prosecutorial discretion in immigration enforcement.

Throughout this suit, Respondents have sought to downplay the radical nature of their argument by claiming the Guidance is a unique program, shocking in scope, with no historical parallel. The lengthy history of discretionary relief shows that this asser-

tion is simply incorrect. *See supra* at 7-13. The nature of deferred action under the Guidance is the same as it has ever been. Although Respondents claim that "the Executive has distorted 'deferred action' beyond this Court's conception of it," Resps.' Br. Op. 21 (citing *Reno*, 525 U.S. at 483-84), the deferred action discussed in *Reno* is the same as that the Guidance contemplates. The recipients of the *ad hoc* deferred action *Reno* endorsed were "lawfully present" for as long as the Secretary chose to defer removal, they were able to apply for work authorization, and they were theoretically eligible for Social Security and other benefits. If this Court were to hold the Guidance unlawful, its decision would have the effect of rendering unlawful all grants of deferred action made over the past several decades.

Nor is the Guidance unique in scope. Deferred action and related forms of discretionary relief have often been applied on a class-wide basis, most notably during the Family Fairness initiative of the Reagan and first Bush administrations. *See supra* at 9-13. As a percentage of the total undocumented population, the approximately 4 million potential DAPA applicants are no larger than the 1.5 million immigrants who were eligible to apply for Family Fairness at a time when there were only 3.5 million undocumented immigrants in the United States. *See* J.A. 65, 95; J.A. 188-189; J.A. 213-215 (40% of then-existing undocumented population eligible to apply for Family Fairness).

Far from being unique, the Guidance is just the latest manifestation of the Executive's broad authority to use discretionary relief from removal to address pressing immigration issues. Congress has re-

peatedly recognized and endorsed in legislation the Secretary's preexisting authority to grant deferred action. *See supra* at 11-12. And Congress can always "limit [DHS's] exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing [its] power," *Heckler*, 470 U.S. at 833, but it has not acted to curtail deferred action. Until it does so, the Guidance is a lawful exercise of the Secretary's authority.

IV. THE TAKE CARE CLAUSE DOES NOT GIVE RESPONDENTS A CLAIM, AND IN ANY CASE THE GUIDANCE IS A FAITHFUL ATTEMPT TO EXECUTE THE LAW

There is no independent claim under the Take Care Clause because any analysis of whether the Executive is faithfully executing the laws is entirely duplicative of the statutory analysis, *supra*. But even if this Court disagrees, it should hold that Respondents cannot challenge the Guidance under the Take Care Clause, for at least three sound reasons.

First, in litigation, the Take Care Clause functions as a shield, not a sword; litigants may not assert claims under it, and it does not give rise to a cause of action. Article II places "[t]he executive Power . . . in a President of the United States of America," who shall "take Care that the Laws be faithfully executed" both "personally and through officers whom he appoints." U.S. Const. art. II, § 1, cl. 1; U.S. Const. art. II, § 3; *Printz v. United States*, 521 U.S. 898, 922 (1997). The Constitutional language helps define the contours of the separation of powers, vesting discretionary authority to execute the laws directly in the Executive itself. Recognizing

this "textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Court has repeatedly emphasized the need to protect the Executive's authority to enforce the laws free from intrusion by Congress or the courts. *See, e.g.*, *Lujan*, 504 U.S. at 577; *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484 (2010); *Franklin v. Massachusetts*, 505 U.S. 788, 827-28 (1992) (Scalia, J., concurring).

The shield the Take Care Clause provides is particularly effective when suit implicates the exercise of prosecutorial discretion, such as when an agency declines to institute enforcement proceedings. *Heckler*, 470 U.S. at 832. Such discretion has "long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" *Id.* Granted, the Take Care Clause does not itself grant the Executive some affirmative power or carte blanche to seize property or otherwise behave as it sees fit. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) (the provision bestows "a governmental authority that reaches so far as there is law"). But neither does it provide an independent ground for suing the Executive; while it "perhaps limits and defines the Executive Power Clause's grant of executive power . . . [i]t does not . . . eviscerate [the Executive's] powers of control and supervision over the administration of federal law." Steven Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 583-84 (1994).

Second, even if a Take Care Clause claim could

ever theoretically be had, Respondents' claim in this case would be a non-justiciable political question because the Clause does not provide "judicially discoverable and manageable standards for resolving" Respondents' claim. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012); *Baker*, 369 U.S. at 217. Respondents ask this Court to "supplant a[n immigration] policy decision of the political branches with [its] own unmoored determination of what United States policy toward [immigration enforcement] should be." *Zivotofsky*, 132 S. Ct. at 1427.

Normally, the courts review agency action by using the APA's clear standards for determining lawfulness. 5 U.S.C. § 706. A separate assessment of the *faithfulness* of the executive's immigration enforcement would presumably recapitulate this analysis, just with less precision; "faithfulness" is not a judicially discoverable and manageable standard. Immigration enforcement "involve[s] the exercise of a discretion demonstrably committed to the executive." *Baker*, 369 U.S. at 211; *see Arizona*, 132 S. Ct. at 2499, 2505-06. Determining whether the Guidance is consistent with the Executive's duty to faithfully execute immigration law would require policy determinations of a kind clearly for nonjudicial discretion. Just as DHS "is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities[,]" it is also far better equipped to assess the faithfulness of its actions. *Heckler*, 470 U.S. at 831-32; *see* J.A. 44-49. If Congress disagrees with the Secretary's assessment, it can limit the agency by setting different priorities or restricting its ability to grant deferred action or

work authorization. *Heckler*, 470 U.S. at 833. In the meantime, this Court should not entangle itself in a political question not given to judicial resolution.

Third, even if Respondents can pursue a Take Care claim, that claim fails because the Secretary acted in good faith to effect Congress's instructions to prioritize removals of serious criminals and other high-priority targets. *Youngstown*, which Respondents cited below as a basis for their argument, D.Ct. Dkt. 64 at 4-12, provides no substantive legal test, and in fact in that case the Take Care Clause was asserted as a basis for expanded Executive authority, not as a limit on it. *See Youngstown*, 343 U.S. at 635-36 (Jackson, J., concurring). Nonetheless, Justice Jackson's three-part framework for evaluating claims of Executive power helps demonstrate that Respondents' argument necessarily fails because the Secretary is entitled to the "strongest of presumptions and the widest latitude of judicial interpretation[.]" *Id.* at 635-38.

The Secretary issued the Guidance as part of the Executive's long-established discretionary control over removals. Congress has repeatedly endorsed the Secretary's ability to grant deferred action and work authorization, and Congress has instructed the Secretary to prioritize removals of serious criminals. *See supra* at 11-12, 15. Thus, in issuing the Guidance the Secretary acted "pursuant to an express or implied authorization of Congress, [where] his authority is at its maximum" and he "personif[ies] the federal sovereignty." *Youngstown*, 343 U.S. at 635-37; *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (agency interpretation of its statutory authority entitled to *Chevron* deference). At a bare

minimum, the Secretary acted "in absence of either a congressional grant or denial of authority" and so "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Youngstown*, 343 U.S. at 637.

The practical challenges the Secretary and his predecessors previously confronted make clear that issuing the Guidance was a faithful attempt to execute the law. After Secure Communities and the Morton Memos had proven ineffective at channeling enforcement discretion and focusing resources on high-priority targets, the Secretary needed to adopt a new tactic. Moreover, the experience with the Morton Memos in particular had revealed tremendous inconsistency in the application of prosecutorial discretion, such that outcomes arbitrarily varied based on each immigrant's geographic location. The Secretary needed a way to avoid arbitrary, inconsistent enforcement while more effectively focusing enforcement resources on high-priority targets for removal.

The subsequent success of DACA in preemptively registering hundreds of thousands of low-priority immigrants presented a new way forward. This showed that creating a transparent process to allow proactive applications for deferred action would succeed in permitting USCIS to count, register, and collect biometrics from many previously-unidentified low-priority immigrant parents of U.S. citizens and LPRs. *Supra* at 18-19. This, in turn, would free the enforcement resources of ICE and Customs and Border Protection (CBP) to focus on the high-priority targets that remained in the shrunken pool of uni-

dentified removable immigrants. On these facts, it was not a radical decision for the Secretary to issue the Guidance to serve as the focusing mechanism for the Prioritization Memorandum; it was the only course of action that allowed him to faithfully execute the laws in light of the practical challenges and proven experiences of immigration enforcement.

The irony of Respondents' case is that they have not argued against the conservative, carefully-designed initiative that the Guidance actually is; they instead attack what it emphatically is not. Respondents have continually ignored or downplayed the Guidance's actual effects, instead resorting to such hyperbole as claiming that the Executive has violated the Take Care Clause by committing some extreme "abandonment of the federal immigration laws." D.Ct. Dkt. 14, Am. Compl. ¶ 11. But Respondents again have it backward. The only aspect of this case that does not comport with our system of laws is their own claim that they may interfere in federal immigration enforcement by filing suit. Along with the standing doctrine and the barriers to suit under the APA, the Take Care Clause helps to define the separation of powers. It is for the Executive to faithfully execute the laws, and the Secretary did so here. Respondents' only part in this policy debate is, if they are so inclined, to petition Congress to overturn the Secretary's decision. But they have no place in regulating immigration enforcement, and no basis for filing suit in the federal courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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